"A DISCRIMINATION SO TRIVIAL": A NOTE ON LAW AND THE SYMBOLISM OF WOMEN'S DEPENDENCY

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Until next January 1, a woman in California is permitted to register to vote only if she states her name as "Miss" or "Mrs."[1] Men are not required to use any particular designation or state their marital status. Challenging this law's validity, two women sought to register using the designation "Ms." When the county registrar of voters refused to process their registrations, the women petitioned the superior court for a writ of mandate to compel their acceptance. That court sustained the registrar's demurrer and dismissed the petitions. In *Allyn v. Allison*,[2] the California court of appeal affirmed in three separate opinions. So it was that when two of my colleagues at UCLA, both holders of the Ph.D. degree, sought to register as "Dr.," the male was allowed to do so while the female was required to register as "Miss." Now, that is one silly law.

Silliness, of course, is not the same as unconstitutionality, as dissenting opinions sometimes remind us.[3] Indeed, it was the very insubstantiality of the law that seemed to prevent the justices of the court of appeal from taking the plaintiffs' claim seriously. Precisely because the justices thought they were dealing with a constitutional trifle, they failed to address themselves to the principal issue in the case. The result is not merely that the case was wrongly decided—the Legislature has now rem-

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Author's note: During the seven years when I had the good luck to be Charlie Callahan's colleague, I saw him express anger only once. It had been proposed that the faculty adopt a rule governing "the use of the examination as a teaching device," and Charlie was outraged. It was a lesson for me in academic freedom, but Charlie did not describe his objection in those terms. Instead, he made it clear that no one was going to tell Charlie Callahan how he would teach his courses. That was the way he taught his colleagues: by example. The thought that he was teaching us surely never entered his mind.

Apart from being an immensely civilized man, Charlie was what Bob Lynn and Vaughn Ball call a "straight thinker." He could separate facts from values, and arguments from assumptions, as well as anyone I have ever known. Yet he was genuinely modest, and the rhetoric of eulogy suits him not at all. So I shall stop after passing on one more bit of Callahaniana.

After I left Ohio State, Charlie and I continued our exchange of miscellany; several of his contributions now decorate my office. My favorite is in item from the television page of the Columbus *Dispatch*, announcing the rerun of an old John Wayne movie:

> An undermanned U.S. Cavalry outpost
> attempts to repeal invading Indians.

Charlie's caption was: "Rule of Law, overcommitment to."

[1] CAL. ELECTIONS CODE § 310 (1961) (West Supp. 1973).

[2] 34 Cal. App. 3d 448, 110 Cal. Rptr. 77 (Ct. App. 1973).

[3] *E.g.*, Griswold v. Connecticut, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

edied that[4]—but that the opinions reinforced the evil that made the law not merely silly but unconstitutional.

Each of the *Allyn* opinions deserves attention, much as the works in Madame Tussaud's basement deserve attention. Justice Compton's opinion assumed that the appropriate standard of review was the "rational basis" standard and concluded that the law was reasonable "as an aid in assuring that a previous registration has been cancelled and that a woman [whose marital status has changed] does not vote twice."[5] Weighed against this state's interest, Justice Compton found the plaintiff's interest insignificant:

> Assuming that compliance with [the law] . . . results in the disclosure of marital status, such compliance is not onerous or burdensome. A woman is not disadvantaged in any way by such disclosure. There is nothing private about the status of marriage or its termination.[6]

The contentions of the plaintiffs, Justice Compton concluded, "are more properly addressed to the Legislature."[7]

Presiding Justice Roth agreed with the plaintiffs that the law's distinction between male and female registrants was "without apparent solid reason."[8] He nonetheless concurred:

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[4] Calif. Stats. 1974, ch. 74; *see also* 2 Cal. Legislative Service 208 (West 1974).

[5] 34 Cal. App. 3d at 452, 110 Cal. Rptr. at 80. The assumptions are that a woman who marries takes the surname of her husband and that registration as "Mrs." puts the election officials on notice that the same woman may have been registered previously under her former surname. The initial assumption was correct at common law, and the rule remains largely unchanged by statute. *See* Spencer, *A Woman's Right to Her Name*, 21 U.C.L.A. L. REV. 665 (1973). Six months after the *Allyn* decision, the Attorney General of California issued an opinion that a woman who marries has an election under California law either to keep her name as it has been or to take her husbands' surname. Calif. Ops. Att'y Gen. (March 12, 1974). Even if Justice Compton's assumption that the common law rule prevails in California were correct, the "Miss"/"Mrs." registration requirement adds nothing in the way of investigative leads to the existing requirement that every registrant state whether he or she has registered previously under another name. Justice Compton's opinion said:

> It may or may not be true that a listing of former registrations would necessarily provide the same leads to identification as the designation of Miss or Mrs. but that is not for us to decide.

34 Cal. App. 3d at 452, 110 Cal. Rptr. at 79.

As the above-cited note makes clear, the common law rule itself is constitutionally vulnerable in situations in which women choose to retain their surnames upon marriage instead of taking their husbands' names. Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd per curiam*, 405 U.S. 970 (1972), does not refute this statement. In that case, a three-judge district court sustained the validity of Alabama's requirement that a married woman's driver's license be issued in her "legal name," which included her husband's surname. The court noted that the state had provided a "simple, inexpensive means" for a married woman to change her name by applying to a probate court. In any case, the Supreme Court's summary affirmance of a three-judge court's decision, though formally a decision on the merits, often is the functional equivalent of a denial of certiorari. See Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 74 n.365 (1964).

[6] 34 Cal. App. 3d at 453, 110 Cal. Rptr. at 80.

[7] *Id.* at 453, 110 Cal. Rptr. at 80.

[8] 34 Cal. App. 3d at 453, 110 Cal. Rptr. at 80.

> At bench, however, the difference complained of is [*sic*], and over a long period of years has had, so little effect upon the allegedly wronged party, that even though it could be probably whipped and beaten into constitutional proportions, I cannot engender sufficient provocation to attempt to correct through the judicial process a discrimination so trivial without giving the first opportunity to the Legislature to satisfy all those truly interested.[9]

Any editing of Justice Fleming's opinion would run the risk of omitting a wink here or a knowing chuckle there. The opinion merits quotation in its precious fullness:

> Like titles of military rank the market in titles for women never ceases to fluctuate. The earlier respected title of MISTRESS has fallen on hard times, and the once vaunted title of MADAM has suffered a worse fate, rehabilitative efforts of Frances Perkins and Pearl Mesta notwithstanding. On the other hand the title MISS, probably an abbreviation for MISTRESS, has risen in the scale from a designation for a concubine to one for a young unmarried woman, while the title MRS., also an abbreviation for MISTRESS, has fallen from a title of gentility to one now extended to all married women without superior titles. Petitioners here assert a constitutional right to the use of a third title, MS., on the ground they are affronted and offended by having to choose between MISS and MRS. and thereby designate their marital status for purposes of voting registration.
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> Apart from general custom I find no essential connection between marital status and use of the titles, MISS and MRS. Actresses today, even those who have married as many times as the sands of the sea, use the title MISS. In past centuries the practice was the precise opposite, and actresses and authoresses used the title MRS. regardless of marital status, as for example, Mrs. Siddons and Mrs. Hannah More. Nor was this custom limited to women in public life, for during the 17th and 18th centuries usage of the title MRS. by unmarried women in private life was common. (See entry for *Mrs.* in The Oxford English Dictionary, Clarendon Press (Oxford 1933).)
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> In my view a female voter registrant is free to use either of the two authorized descriptive titles, MISS or MRS., regardless of marital status. If a choice of two titles is deemed insufficient and a third option is desired, then the remedy lies with the Legislature and not with the courts.[10]

The constitutionality of the California legislation thus rested on a precarious tripod: (1) one justice's conclusion that the law did not condition registration to vote upon the disclosure of a woman's marital status; (2) another justice's conclusion that because the law did just that, it might have been a reasonable safeguard against vote fraud; and (3) a third justice's conclusion that the law was probably unconstitutional but

[9] *Id.* at 454, 110 Cal. Rptr. at 80.

[10] *Id.* at 454-55, 110 Cal. Rptr. at 81.

somehow *de minimis*. Two themes run through all the opinions. First, the plaintiffs are complaining about something paltry. Second, if there is anything to complain about, they should complain not to the courts but to the Legislature. Both those propositions are wrong.

I. STATUS, SYMBOL AND SUBSTANCE[11]

If California were to require prospective voters to designate their race in order to register, such declarations might be of some aid in preventing voting fraud. Justice Compton's opinion seems to embrace such a case:

> No invidious discrimination can be found in a reasonable attempt to identify electors whether by sex or by any other natural and logical means of classification.[12]

Presumably, however, Justice Compton would reach a different result in the hypothetical racial-designation case, even though there were no evidence that any election official had sought to inhibit voting by members of any race or to use the information about race for any other improper purpose. What would be the evil in requiring a racial designation for voters? Would it not lie primarily in the sphere of symbol?[13]

One response might be that racial classifications are distinguishable because they are "suspect," requiring justification by reference to some

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[11] I am grateful to my colleague Harold Horowitz, Professor of Law at UCLA, for his many contributions to my thinking on "equality as a fundamental interest." Even the phrase is his.

[12] 34 Cal. App. 3d at 453, 110 Cal. Rptr. at 80.

[13] In Hamm v. Virginia State Bd. of Elec., 230 F. Supp. 156 (E.D. Va.), *aff'd per curiam sub nom.* Tancil v. Woolls, 379 U.S. 19 (1964), the maintenance of racially separate voting, tax, and property records was held unconstitutional. In Virginia, of course, the potential harms might have been thought to be more than symbolic. In the same case, the courts approved the maintenance of racial data in divorce proceedings; the district court remarked that such data might be useful in keeping vital statistics. Our hypothetical racial designation of voting registrants would arguably serve a similarly neutral purpose. Yet it seems clear that such a requirement would be held invalid, even absent any actual discrimination in the electoral process. Anderson v. Martin, 375 U.S. 399 (1964), held that Louisiana could not require the designation of a candidate's race on the ballot. The state, it was held, is constitutionally disabled from encouraging voters to identify candidates according to race, whether or not any actual racial discrimination by voters might be shown. The *Anderson* decision is perhaps most satisfyingly explained as resting on an underlying concern that is broader: the impropriety of a state's encouraging people to focus on a person's race as a key aspect of the person's identity. Virginia's requirement of racial designations on property and tax records in the *Hamm* case may be viewed in such a light.

The interest in question may be seen as an aspect of a right of privacy—not in the sense of "the right to be let alone," which is an unhelpful constitutional catchall, but in its original sense. The interest in privacy is an interest in selective disclosure, in maintaining control over the way others see us. Government should have a very good reason for requiring a disclosure of one's race. Such a rule is grounded in the historical use of racial designations as stigmata of caste. However, Wisconsin v. Constantineau, 400 U.S. 433 (1971) recognizes that a nonracial "badge of infamy" (in this case, inclusion in a publicly-posted list of excessive drinkers) may also be of constitutional dimension. My argument is merely that the symbolism of women's dependency deserves similar judicial scrutiny.

"compelling" state interest—which none of the justices seemed to think present in the California voting registration case. In California, the easy, but conclusory, answer is that the state supreme court has already held that sex, like race, is a "suspect classification."[14] A more meaningful answer can be found in an examination of the core values of a constitutional principle of equality.

If a city segregates the races on a public beach, the chief harm to the segregated minority surely is not that it is deprived of the enjoyment of a few hundred yards of surf. Jim Crow was a system of degradation imposed by laws that were primarily aimed at symbolizing the inferiority of blacks.[15] Whatever may have been the rationale for *Brown v. Board of Education*,[16] the Supreme Court has now definitively established that any state-supported racial segregation is a denial of the equal protection of the laws.[17] No one would seriously suggest that the reason lies in anyone's substantive interest (apart from the question of degradation) in sitting in the front of the bus or swimming in a public pool on Tuesday rather than Wednesday. It is state sponsorship of the symbolism of racial inferiority that is unconstitutional.

Inequality is harmful *chiefly* in its impact on the psyches of the disadvantaged. Once a certain subsistence level is attained, what really matters about inequality is something that happens inside our heads:

> The peculiar evil of a relative deprivation . . . is psychic or moral; it consists of an affront; it is immediately injurious insofar as resented or taken personally, and consequentially injurious insofar as demoralizing.[18]

Dred Scott v. Sandford,[19] in other words, was a landmark decision not because of its contribution to the arcana of diversity jurisdiction. In the eyes of whites, to be sure, the decision was important because it limited

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[14] Sail'er Inn, Inc. v. Kirby, 5 Cal.3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

[15] *See* C. WOODWARD, THE STRANGE CAREER OF JIM CROW (2d rev. ed. 1966).

[16] 347 U.S. 483 (1954).

[17] The principle has been applied to the seating in courtrooms and on buses, and to the use of public parks, beaches and golf courses. *See* the list of cases in G. GUNTHER & N. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1426 (8th ed. 1970).

[18] Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 49 (1969). For a comparison of the symbolism of inferiority in cases of race and in cases of wealth distinctions, see Note, *The Evolution of Equal Protection—Education, Municipal Services, and Wealth*, 7 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 103, 130-38 (1972). A similar symbolism-of-inferiority argument can be made in support of the decision of the California Supreme Court in Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), holding substantial wealth-based differentials in school-district spending to be unconstitutional. I have discussed the point in my article, *Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law*, 60 CALIF. L. REV. 720, 749-51 (1972).

[19] 60 U.S. (19 How.) 393 (1857).

the power of Congress to prohibit slavery in the territories. But in the eyes of blacks, what mattered was that they were branded as "a subordinate and inferior class of beings,"[20] incapable of achieving citizenship.[21] In modern constitutional parlance, race is a suspect classification *primarily* because the dignity of being recognized as a person—a citizen—is itself a basic right, a "fundamental interest."[22]

Furthermore, the dignity of citizenship is fundamental in the same way that the right to vote is fundamental:[23] it is instrumental in the attainment of a wide range of other goods in an achievement-oriented society. Given the risks and uncertainties that attend decision making, it is not surprising that one's self-perception is enormously influential in determining choices—especially those role decisions (about careers, marriage, etc.) that are themselves crucial in defining one's future.[24] If we are trained to think of ourselves as incapable of performing a social role, then we will be incapable. So-called "peasant fatalism," for example, has important roots in that special sense of futility that is associated with a sense of personal worthlessness.[25] So, also, a central concern of today's women's

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[20] 60 U.S. at 404-05.

[21] For one response by northern blacks to this aspect of the decision, see 1 A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 392 (H. Aptheker ed. 1951; paperbound ed. 1965).

It is precisely the fact that the Supreme Court spoke as interpreter of the Constitution that gave *Dred Scott* is degrading impact. For a degradation ceremony to succeed, writes Harold Garfinkel, the denouncer

> must make the dignity of the supra-personal views of the tribe salient and accessible to view, and his denunciation must be delivered in their name. . . . The denouncer must arrange to be invested with the right to speak in the name of these ultimate values.

Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420, 423 (1956).

[22] *See* Morris, *Persons and Punishment*, 52 THE MONIST 475, 493 (1968):

> This right to be treated as a person is a fundamental right belonging to all human beings by virtue of their being human. It is also a natural, inalienable, and absolute right.

Morris argues that the right to be treated as a person implies a right to a "punishment model" of treatment for anti-social behavior, as distinguished from a "therapy model." Punishment assumes that the offender is responsible; therapy is demeaning in its suggestion that the offender "cannot help" his or her acts, any more than an animal can. The value at stake in Morris' discussion is only secondarily "the right to punishment." It is more basically the right to be treated as one who is free to make independent choices. It is this sense of being a person that is undermined by legal rules symbolizing a woman's dependency.

[23] *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964). The California Supreme Court has similarly characterized education as an interest that is fundamental because it is instrumental, "preservative of other basic civil and political rights . . . ." Serrano v. Priest, 5 Cal. 3d 584, 607-08, 487 P.2d 1241, 1258, 96 Cal. Rptr. 601, 618 (1971), quoting from the *Reynolds* opinion, 377 U.S. at 562. The *Serrano* court also made much of the fact that education is "unmatched in the extent to which it molds the personality of the youth of society." *Id.* at 609-10, 487 P.2d at 1258-59, 96 Cal. Rptr. at 618-19.

[24] *See, e.g.*, Simon, *Theories of Decision-Making in Economics and Behavioral Science*, 49 AM. ECON. REV. 253, 272-74 (1959).

[25] *See* E. BANFIELD, THE MORAL BASIS OF A BACKWARD SOCIETY 63-65 (paperbound

movement is the problem of dependency. The point finds expression in economic and political terms, but the most destructive dependency of all is psychological, the dependency that limits a woman's sense of who she is and what she can do.[26]

For the law to contribute its own symbolism of dependency to this role-confining process is historically understandable but nonetheless unacceptable within a serious guarantee of the equal protection of the laws. The process by which law confers legitimacy on a structure of domination and dependency is *primarily* a system of symbols.[27] For a court to add the judiciary's own special *imprimatur* of legitimacy[28] on the symbolism of women's dependency is particularly destructive.

Of course, law—any law—implies inequality. Inequality is built into a system of norms and sanctions;[29] legislation necessarily classifies. And law, at least law-as-rules, is necessarily a system of symbols. Some symbolism of inequality is thus inescapable if we are to have law. A legal system constitutionally disabled from employing any such symbolism is a legal system that cannot function. However, no such self-defeating remedy is required. What is required is a special judicial sensitivity to the

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ed. 1967); Ortiz, *Reflections on the Concept of "Peasant Culture" and "Peasant Cognitive Systems,"* in PEASANTS AND PEASANT SOCIETIES 322, 327-28 (T. Shanin ed. 1971).

[26] The literature of the women's movement is growing rapidly, and most of it treats the theme of dependency. The pervasiveness of the psychological dependency in question is, sadly, demonstrated by some of this very literature. For a perceptive and buoyant comment, see Fleming, *Up From Slavery—to What?*, NEWSWEEK, Jan. 21, 1974, at 14. There is an excellent law-oriented analysis of the psychology of dependency in Cavanagh, *"A Little Dearer than His Horse": Legal Stereotypes and the Feminine Personality*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 260 (1971); the note includes citations to a wealth of social science material and is indispensable reading for anyone who wants to pursue the subject of this article. *See also* L. KANOWITZ, SEX ROLES AND SOCIETY: CASES AND MATERIALS, chs. 1 and 2 (1973).

The process of a woman's role-definition is one in which both the woman and others participate. The title "Ms." is designed, in other words, both for the woman's own consumption and for the edification of the outside world:

> A woman who uses the title Ms does not want to be identified solely on the basis of her marital status, but to be identified as a person with a more complex set of relationships. This means that she must see herself as something more than a wife or non-wife, and opens up a whole world of possibilities as to how she identifies herself. But the use of Ms also immediately changes the relationships between the woman and the people who address her by this title. Most obviously, they must become aware that she does not consider her marital status to be the main source of her identity, and thus the whole structure of the society assumed in the Miss/Mrs dichotomy is called into question.

B. Sonka, Language, Self-Concept and Social Change (unpublished manuscript, 1973). Seen in this light, the use of the designation "Ms." has political-expression dimensions as well as the equality dimensions discussed in the text.

[27] The obligatory reference is the work of Max Weber. His analysis of legitimacy is summarized and made tidy in R. BENDIX, MAX WEBER: AN INTELLECTUAL PORTRAIT 297-300 (1960). For Weber's own (rather more diffuse) words, see MAX WEBER ON LAW IN ECONOMY AND SOCIETY 322-37 (M. Rheinstein ed. 1954).

[28] *See* C. BLACK, THE PEOPLE AND THE COURT, ch. II (1960).

[29] *See* R. DAHRENDORF, ESSAYS IN THE THEORY OF SOCIETY 167-69 (1968).

impact of legislative symbolism on any person's sense of first-class citizenship, on any person's sense of individuality, independence and self-worth. Doctrinally speaking, such sensitivity is conveniently expressed in the notion that classification on the basis of sex is "suspect," requiring justification by a compelling state interest.

That large numbers of women, even a majority, may prefer the designations of "Miss" and "Mrs." surely is not controlling. Even today some blacks may choose to ride in the back of the bus. Still, the majority's preference is relevant to a judicial determination of the meaning that should be attached to legislative distinctions. For example, when Justice Roth called the California statute's discrimination "trivial," he very likely thought that the plaintiffs were straining to take offense at something innocuous. Since a "person gets from a symbol the meaning he [*sic*] puts into it,"[30] it would be possible, at least in theory, for anyone who feels disadvantaged by legislation to find in the law some symbol that is assertedly degrading. Should every distinction based on sex then be struck down if one person finds it symbolically degrading?

The principle that sex, like race, is a suspect classification, is not a constitutional commitment to the leveling of all legislative distinctions between the sexes. The principle merely shifts the burden of justification to those who assert the validity of any such distinction. Some state interests will surely he held to be "compelling." In the *Allyn* case, however, the state's interest is so insubstantial that it not only fails the compelling-state-interest test, but its very lack of substance also heightens the symbolic impact of the law. Given the statute's obvious futility in reducing vote fraud,[31] its *main* effect was symbolic: telling a woman that before she might exercise the most basic function of citizenship, she must declare how she relates to men.

The refusal of all three justices of the court of appeal to take the plaintiffs' claim seriously was an additional insult, not exactly softened by one justice's effort to amuse. The failure of sensitivity that produced this additional harm was also a doctrinal failure. The fourteenth amendment was designed, first and foremost, as a guarantee of the dignity of cit-

[30] The quotation is from Mr. Justice Jackson's opinion in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 632-33 (1943). Jackson's point is given special meaning in our context by the case of Hamilton v. Alabama, 376 U.S. 650 (1964). In that case, a black woman refused to answer questions put by a state-court judge who addressed her as "Mary," saying she would answer if he would call her "Miss Hamilton." The judge cited her for contempt, and imposed a five-day jail sentence and a $50 fine. The U.S. Supreme Court reversed without opinion, citing Johnson v. Virginia, 373 U.S. 61 (1963) (state-compelled courtroom segregation held unconstitutional). The *Hamilton* case stands primarily for a principle of racial equality, but it also recognizes that the dignity of citizenship may be bound up in a personal title.

[31] See note 5, *supra.*

izenship; it *begins* by "overruling" *Dred Scott.* In our own time, the extension of the equal protection clause to substantive interests other than racial equality should not blind us to the continued fundamental importance of the dignity of citizenship. If a legislature enacts into law a discrimination that symbolizes any citizen's dependency, the least we can ask is that the judiciary insist on a very good reason for the discrimination.

II. WAITING FOR THE LEGISLATURE

When the *Allyn* case was decided by the court of appeal, bills were pending before the Legislature that "would accomplish the result which [plaintiffs] seek."[32] This consideration undoubtedly played a great part in Justice Roth's concurrence and was mentioned in Justice Compton's opinion as well. The California Supreme Court probably denied a hearing for the same reason; considering that court's previous clear holding that classification on the basis of sex is suspect, the denial of a hearing could hardly have been based on its approval on the merits of the decision below. The Legislature has now acted, and plaintiffs will be able to register as "Ms."—fourteen months after the decision of the court of appeal.

This deference to the Legislature may have been influenced by the view that courts should be guided by "a policy of strict necessity in disposing of constitutional issues."[33] However, that policy—as spelled out in Justice Brandeis' famous *Ashwander* concurrence[34]—is largely a policy favoring the *avoidance* of constitutional questions when other grounds may be found to support a decision. The policy is most assuredly not an invitation to uphold constitutionally dubious legislation in the anticipation that it may be amended. No doubt it is desirable to maintain a spirit of accommodation between the judicial and legislative branches; unnecessary confrontations are properly avoided. To that end, the California court of appeal might have stayed the *Allyn* decision, avoiding a ruling on the merits pending legislative action that seemed imminent. Instead, the court ruled on the merits and validated the legislation, reinforcing the law's injurious effect by stamping it with the mark of constitutional legitimacy.

A more serious criticism derives from the previous discussion of the primacy of the symbolism of citizenship. In a situation involving the stigma of caste, there is special need for a judicial declaration of uncon-

[32] 34 Cal. App.3d at 453 n.4, 110 Cal. Rptr. at 80 n.4.

[33] Rescue Army v. Municipal Court, 331 U.S. 549, 568 (1947).

[34] Ashwander v. TVA, 297 U.S. 288, 346-48 (1936).

stitutionality. It would be unthinkable, for example, for a court to uphold any official state symbolism of racial inferiority on the ground that the legislature was considering a repeal of the offending law. The essential harm in such a case is not fully repaired by the repealing legislation; what the plaintiffs need is an authoritative declaration of their rights as citizens, not a political accommodation. *Brown v. Board of Education*[35] means more in American life than any legislative repeal of school-segregation laws ever could have meant. Because the Supreme Court *is* a court, its constitutional invalidation of racial segregation has given a special form of legitimacy to the movement for racial equality. Blacks are no longer supplicants for legislative grace; they demand the rights of citizenship.[36] The judiciary has an indispensable role to play in erasing the symbolism of caste and dependency. Confronted with an opportunity to fulfill that role, the California justices told the *Allyn* plaintiffs to go away and stop bothering them with trifles.

III. Symbolism and the Equal Rights Amendment

Two years ago, Congress approved and submitted to the states for ratification a proposed twenty-seventh amendment to the United States Constitution. Its substantive provision, section 1, states:

> Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

The majestic opacity of this language has led some observers to oppose the amendment on the ground that it is too unspecific, or too rigid, or perhaps merely duplicative of the equal protection clause.[37] In particular, Paul Freund has expressed reservations about the assumed symbolic value of the amendment:

> The value of a symbol . . . lies precisely in the fact that it is not meant to be taken literally, that it is not meant to be analysed closely for its exact implications. . . . When . . . we are presented with a proposed amendment to our fundamental law, binding on federal and state governments, on judges, legislatures and executives, we are entitled to inquire more circumspectly into the operational meaning and effects of the symbol. . . . For if the amendment is not only a needless misdirection of effort in the quest for justice, but one which would produce anomalies, confusion, and injustices, no symbolic value could justify its adoption.[38]

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[35] Note 14, *supra.*

[36] *See* Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 246-48 (1968). Judge Carter is the former General Counsel of the NAACP.

[37] *See, e.g.*, Freund, *The Equal Rights Amendment is Not the Way*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 234 (1971); Kurland, *The Equal Rights Amendment: Some Problems of Construction*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 243 (1971).

[38] Freund, note 37 *supra*, at 237.

Since we cannot be sure how courts will interpret the amendment in such diverse contexts as conscription for military service, particpation in school athletics, and the relation of differential life expectancies to the cost of life insurance—so the argument goes—we should address ourselves not to the enactment of a constitutional slogan but to particularized legislative attacks on specific substantive evils, such as employment discrimination.[39]

The lack of specificity of the amendment is undeniable, but much of our constitutional law rests on language no more precise. I, for one, am glad that the framers of the fourteenth amendment, like the framers of the Bill of Rights, did not seek to spell out a detailed code but were content with stating general principles in general language. Congress and the courts were invited to flesh out the fourteenth amendment;[40] in the same way, they will be invited to give detailed meaning to the proposed twenty-seventh amendment, and with about as much guidance for specific applications. The difference, of course, is that women today are politically articulate far beyond the capacities of the newly freed slaves in 1868, and they will press their constitutional claims to equality in courts that have become accustomed to responding favorably to analogous claims of racial equality. It is possible that at least some of the opponents of the amendment fear a new and "unprincipled" judicial activism more than they fear any particular change in substantive law.[41]

The proposed amendment does promise judicial activism in the area of sex discrimination. The most likely result is not that courts will set about ending all legislative distinctions based on sex—the expression of that concern has always seemed more like a debater's point than a real fear—but rather that the amendment will be interpreted to require government to justify sex distinctions on the basis of compelling interests. Such a result is compatible with the use of the word "equal" in the proposed twenty-seventh amendment, as it has become compatible with "equal protection." "Strict scrutiny" of sex distinctions will be the order of the day, constituting one major doctrinal advance beyond current interpretations of the equal protection clause. Indeed, one reason why the Supreme Court majority thus far has resisted adding sex to the list of suspect classifications may be to preserve for the twenty-seventh amendment a meaning independent of the equal protection clause but not departing greatly from its familiar standards. In the meantime, the Court

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[39] *Id.* at 238-41.

[40] *See* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

[41] *Compare* Kurland, note 37 *supra, with* P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT, ch. 4 (1970).

seems bent on achieving many of the results of a strict-scrutiny standard of review in sex-discrimination cases while not admitting the use of that standard.[42] The proposed amendment will make the more exacting standard explicit by treating sex as a suspect classification. While that may not be of great moment at the level of the Supreme Court, it will be of enormous importance to litigation in the lower courts, where doctrine matters mightily.

Finally, however, the twenty-seventh amendment will be, in Professor Freund's own words, "a symbol that the nation has made a commitment to justice for women under law."[43] Given judicial decisions like *Allyn v. Allison*, such a symbolic statement obviously is not a redundancy, even when addressed to judges. But the Constitution, as Mr. Justice Black was fond of saying, is not addressed merely to judges. It speaks to us all, even when it speaks in generalities. Given the primacy of symbolism in role definition, very likely the twenty-seventh amendment will make its most important marks outside the processes of legislation and litigation. By "raising the consciousness" of both men and women, the amendment will affect not only lawmaking but the primary conduct of millions of citizens. If, along the way, judicial sensitivities can be heightened above the levels represented by the *Allyn* opinions,[44] that would also be gratifying.

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[42] *E.g.*, Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); *cf.* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

In the *Frontiero* case, four justices agreed that sex is a suspect classification. Mr. Justice Powell's opinion, arguing that the Court should not "unnecessarily" decide this issue while the equal rights amendment is pending ratification, seems to support the suggestions in the text as to the majority's view of the amendment.

The one recent decision out of line with the trend suggested is Kahn v. Shevin, 94 S. Ct. 1734 (1974), sustaining Florida's annual property tax exemption of $500 for widows (but not for widowers). In the *Kahn* opinion, which emphasizes the law's amelioration of economic harms resulting from employment discrimination against women, the Court seemed to be looking over its shoulder at De Funis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973), *dismissed as moot*, 94 S. Ct. 1704 (1974).

[43] Freund, note 37, *supra*, at 237.

[44] These attitudes are in no sense local to California. *See* Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. REV. 675 (1971).